IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962.

No. 480

LOUIS McNEESE, JR., a minor, by Mabel McNeese, his mother and next friend, et al.,

Petitioners,

vs.

BOARD OF EDUCATION FOR COMMUNITY UNIT SCHOOL DISTRICT 187, CAHOKIA, ILLINOIS, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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INDEX.

List Of Authorities Cited

Cases:

Statutes Cited:

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Petitioners, Louis McNeese, Jr., et al., minors, by their parents and next friends, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled cause on July 5, 1962.

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Appeals, reprinted in Appendix A hereto, is reported at 305 F. 2d 783 (1962). The opinion of the District Court, reprinted in Appendix B, is reported at 199 F. Supp. 403.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 5, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED.

1. Whether the Plaintiffs, in a class action in a school segregation case brought under the Civil Rights Act, R.S. §1979, are to be denied the right to have a Federal District Court enjoin a local board of education, acting under color of law, from continuing to operate the local public school system on a racially segregated basis, solely because the individual plaintiffs have not exhausted alleged "administrative remedies" provided by a state statute.

2. Whether plaintiffs, in such a case, are required to exhaust state *judicial* remedies before bringing suit in a Federal District Court to remedy the grievances complained of.

3. Whether the state statute in question provides a judicial or an administrative remedy, or any remedy at all, and if so,

a. Is the remedy *available* to an injured party?

b. Is the remedy *adequate* to provide full and complete relief for the plaintiffs' complaints?

STATUTES INVOLVED.

Title 42 U. S. Code, Sec. 1983:

> Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 28 U. S. Code §1343(3):

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> • • •
>
> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, or of any right, privilege or immunity secured by the Constitution of the United States or by any Acts of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

Illinois Revised Statutes 1961, Ch. 122, Sec. 22-19:

> The provisions of this, the state statute in question, are reprinted in Appendix C to this Petition.

STATEMENT.

Petitioners brought this action in the United States District Court for the Eastern District of Illinois under the Civil Rights Act (42 U.S.C. 1983), seeking a declaratory judgment and an injunction to restrain the defendants from requiring plaintiffs to attend racially segregated public elementary schools in Centreville, a city located in Southern Illinois. Jurisdiction was based on Title 28, U.S.C. §1343(3). On November 22, 1961, the District Court dismissed the Plaintiffs' Amended Complaint for failure of the Plaintiffs to pursue a certain alleged "administrative remedy" provided by an Illinois statute. On July 5, 1962, the Court of Appeals affirmed, for the same reason.

The Amended Complaint alleged:

Plaintiffs are minor Negro children who attend school at Chenot Elementary School, located in School District 187, St. Clair County, Illinois. (App. 3)

Prior to 1957, Negro children residing in the Chenot school attendance area attended separate segregated classes at the Centreville Elementary School. They were required to attend classes in the afternoons while white pupils attended classes in the mornings. (App. 6)

The Chenot school, which was opened in 1957, was planned and built, and its attendance area lines were so drawn, in accordance with a so-called "neighborhood school policy," as to make it an exclusively Negro school in its student enrollment. (App. 6)

Because of overcrowding in the adjacent Centreville Elementary School, all fifth and sixth grade students, 97%

of whom were white, were transferred to the Chenot school. (App. 7)

The Defendants maintained and are maintaining separate classes for white and Negro students in the Chenot school. (App. 7)

Negro students at the Chenot school attended classes in one part of the building while white students attended classes in another. Negro students were required to use entrances and exits separate from those used by white students. (App. 8, 9)

Negro teachers on the faculty were assigned to teach all-Negro classes exclusively. While some white teachers taught some Negro pupils, no Negro teachers were assigned to teach any white pupils. (App. 8)

Defendants have used the "neighborhood school policy", and have intentionally drawn the boundaries of the attendance areas of the schools in such a manner that Plaintiffs are compelled to attend racially segregated schools, and have maintained separate classes for white and Negro students, thereby depriving Plaintiffs of due process of law and equal protection of the laws contrary to the Constitution of the United States. (App. 9, 10)

REASONS FOR GRANTING THE WRIT.

1. The decisions of the Courts below directly conflict with the decisions in the Fifth Circuit as to the necessity for exhausting administrative remedies. See *Mannings* v. *Bd. of Public Instr.*, 277 F. 2d 370 (1960); *Borders* v. *Rippy*, 247 F. 2d 268 (1957); *Orleans Parish School Bd.* v. *Bush*, 242 F. 2d 156 (1957); *Gibson* v. *Bd. of Public Instr.*, 246 F. 2d 913 (1957) and 272 F. 2d 763 (1959); *Holland* v. *Bd. of Public Instr.*, 258 F. 2d 730 (1958); *St. Helena Parish School Board* v. *Hall*, 287 F. 2d 376 (1961); and *Bruce* v. *Stilwell*, 206 F. 2d 554 (1953). These cases have consistently held that in cases of this nature brought under the Civil Rights Act, the exhaustion of state administrative remedies is not a prerequisite to filing a suit in a Federal District Court to enjoin the maintenance of a racially segregated public school system. In the *Mannings* case, precisely the same issue was before the Court as in this case. There the Court stated (277 F. 2d at page 372):

> "• • • The following issue is presented: Are the plaintiffs in a class action in a school segregation case, denied the right to have the trial court enjoin a local board of education from continuing to operate the local school system on a racially segregated basis, solely because the individual plaintiffs have not exhausted administrative remedies made available to them to seek admission to certain designated schools?"

The Fifth Circuit has consistently answered that question in the negative. The decisions below answer it affirmatively. Plaintiffs' Amended Complaint would have been sustained in the Fifth Circuit.

2. No Supreme Court case has ever dealt with the necessity for exhausting state administrative remedies in

a school segregation case filed under the Civil Rights Act. Consequently, the lower courts are in conflict and confusion on this question.

As stated previously, the Fifth Circuit has consistently held that the exhaustion of such remedies is unnecessary. The decisions below in this case are in line with certain cases in the Fourth Circuit which have held that the exhaustion of state administrative remedies is necessary in cases such as the one at bar. See *Carson* v. *Warlick*, 238 F. 2d 724 (1956); *Carson* v. *Bd. of Ed.*, 227 F. 2d 789 (1955); *Hood* v. *Bd. of Trustees*, 232 F. 2d 626; *Covington* v. *Edwards*, 264 F. 2d 780 (1959); *Holt* v. *Raleigh City Bd. of Ed.*, 265 F. 2d 95 (1959). On the other hand, another of the Fourth Circuit cases has held that the exhaustion of administrative remedies is not necessary. *Carter* v. *School Bd. of Arlington County*, 182 F. 2d 531 (1950). There the Court said, (p. 536):

> "• • • Nor can it be said that a scholar who is deprived of his due must apply to the administrative authorities and not to the courts for relief. An injured person must of course show that the state has denied him advantages accorded to others in like situations, but when this is established, his right of access to the courts is absolute and complete."

To add further to the confusion, the Eighth Circuit has taken a middle ground. In *Parham* v. *Dove*, 271 F. 2d 132, the Court remanded the case to the District Court and directed that the individual plaintiffs exhaust their administrative remedies (under the Arkansas Pupil Placement Act.) But, the Court further directed the District Court to enter an immediate injunction to restrain the defendants from maintaining a racially segregated school system, and to retain jurisdiction until the individual plaintiffs had exhausted their administrative remedies to determine whether further action was necessary.

As a result of this confusion it is impossible for attorneys to predict whether their cases may properly be filed under the Civil Rights Act without exhausting state administrative remedies. Title 28 U. S. Code §1343(3), which gives the district courts "original jurisdiction of any civil action authorized by law to be commenced • • • to redress the deprivation, under color of any state law, • • • of any right, privilege or immunity secured by the Constitution of the United States or by any acts of Congress providing for equal rights of citizens • • •", contains no limitation such as has been imposed by the Seventh and Fourth Circuits. The Civil Rights Act is rendered largely ineffective in this area while costly and time-consuming litigation on threshold issues of jurisdiction and pleading proliferates.

3. The decisions below conflict with the decisions of this Court in *Monroe* v. *Pape*, 365 U.S. 167 and with *Lane* v. *Wilson*, 307 U.S. 274.

These two cases have firmly settled the issue that state judicial remedies need not be exhausted before a Federal suit may be instituted under the Civil Rights Act. In this case, whatever remedy as may be provided by the Illinois statute in question is *judicial* and not administrative as defendants contend. That statute (Illinois Revised Statutes 1961, Ch. 122, Sec. 22-19) provides in substance as follows:

a. There must be a petition signed by at least 50 persons alleging that racial discrimination exists in a school district.

b. The State Superintendent of Public Instruction then conducts a hearing for the sole purpose of determining whether the allegations of the petition are "substantially correct."

c. If he makes such a determination, he has no power or authority under the Act to give any remedy.

He can issue no cease and desist orders. He can not correct the discrimination he may have found to exist. The only action he can take is to request the State Attorney General to file a suit in a State court.

The remedy, therefore, if any, is not administrative, but judicial, thereby bringing this case squarely within the rule of *Monroe* v. *Pape* and *Lane* v. *Wilson*. If the Courts below had followed the rulings of this Court in those cases, Petitioners' Amended Complaint would have been sustained.

4. The decisions below conflict with the decision of this Court in *U. S. Alkali Ass'n.* v. *U. S.*, 325 U.S. 196 (1944). That case involved Section 5 of the Webb-Pomerene Act, which is similar in many respects to the Illinois Statute under consideration. It provides that if the Federal Trade Commission believes that a trade association is acting in restraint of trade, it should summon the association to appear before it, and conduct an investigation into alleged violations of law. If it concludes that the law has been violated, it shall *recommend* to the association adjustments in its practices, and if the association does not comply, then it shall refer its findings to the Attorney General of the United States for "such action thereon as he may deem proper." The Government filed a suit against the Association charging violation of the Sherman Act. No hearing was held under Sec. 5 of the Webb-Pomerene Act. The Association contended that the authority of the Government to sue was suspended until the Federal Trade Commission had proceeded by way of investigation, recommendation and reference to the Attorney General, and moved to dismiss the complaint. In affirming the lower court's refusal to dismiss the complaint, this Court said (325 U.S. 210):

"Petitioners appeal to the familiar principle that equity will not lend its aid to a plaintiff who has not first exhausted his administrative remedies. • • • *To*

> ***this the answer is, as already indicated, that the only function of the Federal Trade Commission under Section 5 of the Webb-Pomerene Act is to investigate, recommend and report. It can give no remedy. It can make no controlling finding of law or fact. Its recommendations need not be followed by any court or administrative or executive officer.*** (Emphasis ours)

Similarly, under the Illinois statute under consideration, the State Superintendent can merely conduct a hearing, make a finding and *request* the State Attorney General to institute an action in a state court. He can give no remedy. His request to the Attorney General need not be complied with.

Had the Court below followed the decision in the *U. S. Alkali Ass'n.* case, Plaintiffs' Amended Complaint would have been sustained.

CONCLUSION.

There is a conflict between the Circuits. The lower courts are in confusion. The leading Supreme Court cases have been rejected or ignored below. Protection of the Constitutional rights of Petitioners and others similarly situated is being unreasonably delayed by procedural and jurisdictional disputes.

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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RAYMOND E. HARTH,
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APPENDIX A.

Opinion Of The United States Court Of Appeals For The Seventh Circuit

No. 13615 September Term, 1961 April Session, 1962

Louis McNeese, Jr., a minor, by Mabel McNeese, his mother and next friend, et al.,
Petitioners,
vs.
Board of Education for Community Unit School District Number 187, Cahokia, Illinois, et al.,
Respondents.

Appeal from the United States District Court for the Eastern District of Illinois.

July 5, 1962

Before SCHNACKENBERG, CASTLE, and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* This is a class suit on behalf of minor plaintiffs, and all others similarly situated, for redress of alleged deprivation, under color of Illinois law, of their rights to non-segregated public educational facilities in Community Unit School District No. 187, St. Clair

County, Illinois.[1] The District Court dismissed the suit on defendants' motion. Plaintiffs have appealed.[2]

Plaintiffs are Negro elementary school students in the Chenot School in District No. 187, and all are residents of St. Clair County. The substance of their amended complaint is that before construction of the Chenot School in 1957 plaintiffs were compelled to attend the Centreville School in the District under a program which subjected them to discrimination because of their color; and that since 1957 the Chenot School has been maintained under a planned program of discrimination against them because of their color. They seek a decree declaring that the policies of District 187 are unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;[3] an injunction

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[1] 42 U.S.C. §1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. §1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * * (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

[2] This court granted leave to the Chicago Board of Education to intervene as amicus curiae.

[3] U. S. Const. amend. XIV. §1. "* * * No State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

restraining defendants from maintaining their discriminatory policies; and a mandatory injunction requiring defendants to register plaintiffs in "racially integrated" public elementary schools in the District.

The judgment of dismissal by the District Court was based on the ground that plaintiffs had "failed to comply in the remotest manner with" their administrative remedy under the Illinois School Code, Ill. Rev. Stat., 1961, ch. 122, §22-19. Plaintiffs contend that the judgment was erroneous because under the facts alleged in the amended complaint and admitted by defendants' motion they were not required to resort to the administrative remedy provided in the Illinois School Code; and that, in any event, that remedy is not administrative, but judicial and is inadequate. In their complaint they expressly state they have not exhausted the State remedy.

For the first contention they rely upon *Mannings* v. *Board of Public Instruction*, 5 Cir., 277 F.2d 370 (1960); *Borders* v. *Rippy*, 5 Cir., 247 F.2d 268 (1957); *Orleans Parish School Bd.* v. *Bush*, 5 Cir., 242 F.2d 156 (1957); *Bruce* v. *Stilwell*, 5 Cir., 206 F.2d 554 (1953); *Kelly* v. *Bd. of Ed. of City of Nashville*, 159 F. Supp. 272 (M.D. Tenn. 1958).

In *Mannings* the Board of Education had taken no affirmative steps under the *Brown* segregation cases[4] to effect the policy of desegregation. In *Borders* the Board admitted a policy which denied Negroes admittance to school because of color. In *Orleans* plaintiffs had exhausted their administrative remedy. The court neverthe-

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[4] *Brown* v. *Board of Education*, 347 U.S. 483 (1954) and related cases.

less decided that pertinent Louisiana Constitution and statutory provisions were *per se* unconstitutional under the *Brown* cases. In *Bruce* it was admitted the Negro plaintiffs were denied admission to school because of color. In *Kelly* the court held the administrative power was already "committed in advance to a continuation of compulsory segregation."

These cases are not helpful to plaintiffs because of the admission, in each of them, of the fact of discrimination on which the unconstitutionality of the laws and policies involved was determined. That is not true here. Plaintiffs assume as a premise that defendants' motion admitted that before and since 1957, defendants have maintained a racially segregated school system which deprived plaintiffs of "equal opportunity for education." The premise begs the question. Defendants' motion admits facts well pleaded but does not admit the alleged conclusion[1] that the well pleaded facts resulted in discrimination against plaintiffs because of their color.

The amended complaint, so far as pertinent, alleges that the Negroes in District 187, including plaintiffs, were compelled to live in Negro "ghettoes." There is no allegation that this is due to any conduct of defendants. It is alleged that defendants had these "ghettoes" in mind when they made up the "attendance area policy" under which children in exclusively Negro areas are not permitted to attend schools in other areas. There is no allegation that the "attendance area policy" is unconstitutional *per se* as in the *Orleans* case or that the areas were not drawn consistently with an orderly administra-

[1] 2 Moore, Federal Practice ¶12.08.

tion of schools, in the light of the population facts as defendants found them, and in a constitutional manner. This distinguishes *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960) where the Alabama law redefining boundaries of the City of Tuskegee was plainly, deliberately designed to disenfranchise Negroes.

The amended complaint alleges that the Chenot School "attendance area" was planned and drawn so as to make it exclusively Negro. But it is not alleged that the area was not planned and drawn on a rational basis in a proper administrative function, or that it could or should have been planned or drawn otherwise. It is alleged that prior to 1957 Chenot area children attended Centreville School where they were required to attend afternoon classes while white children in the Centreville area were compelled to attend exclusively morning sessions. But it is alleged that "certain slow white fifth and sixth grade" children attended classes all day and that since 1957 fifth and sixth grades from Centreville's overcrowded school, consisting of 3% Negro and 97% white students, attended Chenot School.

We think this analysis of the amended complaint is sufficient to distinguish the cases relied on by plaintiff. It is analogous to a statute which is not unconstitutional "on its face"; and it fails to allege a cause of action which justifies a failure to resort to administrative remedies. *Carson* v. *Warlick*, 4 Cir., 238 F.2d 724, cert. denied, 353 U.S. 910 (1956). Because the amended complaint does not allege school board policies which are unconstitutional in themselves, plaintiffs are required to resort to the remedy held forth in the Illinois School Code before seek-

ing the aid of a Federal Court. *Ibid*; *Parham* v. *Dove*, 8 Cir., 271 F.2d 132 (1959).

The fact that this is a class suit attacking alleged segregation policies and that the *Carson* and other Fourth Circuit cases referred to by plaintiffs involved individual claims of denial of individual civil rights is of no consequence in our decision. The plaintiffs in their class suit are presenting claims based on the denial of civil rights of the individual members of the class represented in the suit. And the class action was a mere procedural vehicle by which the individual rights, common to all members of the class, were presented to the court. The basis of the claims of transgression of individual rights is the same in this case as in *Carson* and others to the same effect.

We see no merit to the plaintiffs' contention that the remedy held out in the Illinois School Code is judicial rather than administrative and that therefore the rule of exhaustion of administrative remedy is inapplicable. In *Cook* v. *Davis*, 5 Cir., 178 F.2d 595 (1949) the school administrators had greater power to correct discrimination in teachers' salaries complained of there than the Superintendent of Public Instruction has under the Illinois School Code to correct the alleged unlawful conduct here. We think, nevertheless, we must apply to plaintiffs' contention here the reasons given by the court there in holding the State remedy administrative and not judicial: The Superintendent of Public Instruction in Illinois has no judicial power and his finding of fact as to whether segregation on account of race or color is being practiced in a school district is not binding in a suit at law or in equity; a complaint before him "may cause an adjust-

ment" if there is substance to the allegations in that complaint; and his decision, when made, merely ripens the controversy for judicial action if needed. On this point plaintiffs are not aided by *Lane* v. *Wilson*, 307 U.S. 268 (1939). The pertinent issue there was whether plaintiff had to resort to the State Courts to "vindicate his grievance" of denial of franchise.

The final contentions made by plaintiffs are that the Illinois administrative remedy is not available to individuals since it must be initiated by a complaint signed by at least fifty persons; and that the remedy is inadequate because the Superintendent of Public Instruction has no power himself to correct the discrimination if he finds it to exist. The requirement of fifty signatures is not in itself an unreasonable one, since the function of the requirement is similar to that of a class suit, that is, one of convenience and orderly procedure for presentation in a common cause many individual complaints instead of many individual particular causes. Also, defendants point out with force that the allegations of the complaint indicate that the School Code remedy would not practically be unavailable to plaintiffs. Furthermore, the School Code gives the Superintendent the power to initiate a hearing whenever he has reason to believe discrimination may exist in any school district. There is no claim that any individual in the class represented by plaintiffs requested the Superintendent to initiate a hearing. And, in practice, if an individual is denied the remedy he may then turn to the Federal Courts.

We must assume the administrative officials will do their duties under the School Code, *Carson* v. *Warlick*,

(Opinion of the United States Court of Appeals)

4 Cir., 238 F.2d 724, 728, cert. denied, 353 U.S. 910 (1956), and it is generally accepted in the cases[*] that Federal Courts should not interfere with a State's operation and administration of its schools, nor with the performance of administrative duties, in the absence of necessity, until administrative remedies have been exhausted.

For the reasons given, we hold that the District Court did not err in "dismissing" plaintiffs' suit on the ground that plaintiffs had not resorted to their administrative remedy under the Illinois School Code.

The judgment of the District Court is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

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[*] *E.g., Parham* v. *Dove*, 8 Cir., 271 F.2d 132 (1959); *Carson* v. *Warlick*, 4 Cir., 238 F.2d 724, cert. denied, 353 U.S. 910 (1956).

APPENDIX B.

Opinion Of The United States District Court Northern District Of Illinois Eastern Division

Juergens, Judge

This class action was instituted by the minor plaintiffs, who appear by their parents and next friends. Plaintiffs are citizens of the State of Illinois and reside within the Eastern District of Illinois.

Jurisdiction is founded on Title 28, U.S.C.A., Section 1343(3), and authorized by Title 42, U.S.C.A., Section 1983.

The amended complaint alleges that the minor plaintiffs are all Negro children, are eligible to attend public elementary schools in Community Unit School District No. 187, which schools are under the management and control of defendants; that the members of the class in behalf of which plaintiffs sue are so numerous as to make it impracticable to bring them all individually before the Court, but there are common questions of law and fact involved, common grievances arising out of common wrongs, and common relief is sought for each plaintiff and each member of the class, and the plaintiffs fairly and adequately represent the interests of the class; that the defendants are presently maintaining and operating public schools in the area or areas of the respective jurisdictions in purported pursuance of the laws of the State of Illinois; that the defendants have adopted and pursued and are presently pursuing a policy, custom and practice in assigning chil-

dren to the elementary public schools in accordance with "neighborhood school policy" or "attendance area policy," where children are compelled to attend schools in the attendance areas in which they reside and are not permitted to attend schools in any other place except in certain special circumstances not applicable to these plaintiffs; that the Chenot School was put into operation in 1957 and was planned and built and its attendance area boundaries were so drawn as to make it an exclusively Negro school in its student enrollment; that as a direct, proximate and foreseeable result of the defendants' adoption and strict pursuance of the alleged "neighborhood school policy" or "attendance area policy", defendants have created and do maintain and operate racially segregated elementary schools and the minor plaintiffs are compelled to attend a racially segregated school by actions of the defendants herein; that prior to 1957 when the Chenot School was put into operation, Negro elementary school students residing in what is now the Chenot attendance area attended the Centreville School, where said Negro children were compelled to attend classes in the afternoon exclusively, while white children attended classes in the morning exclusively with the exception of certain slow white fifth and sixth grade students who attended classes all day; that when the Chenot School was put into operation, all or practically all of the children of elementary school age who resided in the Chenot attendance area were Negroes; that the manner in which the Chenot attendance areas were drawn resulted in making Chenot School an all Negro school in the student enrollment; that because of the crowded condition of the Centreville School, the Board of Education transferred all fifth

and sixth grade classes at Centreville School to Chenot School; that these classes consisted of approximately 97% white and 3% Negro students; that these classes were kept and maintained intact at the Chenot School despite the fact that the children so involved were carried on the rolls as Chenot students and their teachers as members of the Chenot faculty; that as a result of the above and foregoing a situation of racial segregation and separate educational facilities was created and has been maintained by the defendants; that the conditions created continue to exist; that the defendants have failed and refused to desegregate the schools under their jurisdiction but act in such a manner to perpetuate the system of segregated schools and facilities; that by reason of the "neighborhood school policy" or "attendance area policy" as adopted and enforced by the defendants and as a result of the schemes, plans and contrivances of the defendants in drawing the boundary lines in the schools under their jurisdiction, the defendants have created and are maintaining and operating racially segregated public elementary schools in District No. 187 and the minor plaintiffs are assigned to and compelled to attend such racially segregated school by the acts of the defendants and consequently are denied the equal protection of law and equal opportunity for education to which they are entitled by reason of law; that requiring plaintiffs and their class to attend the segregated schools and educational facilities causes them to suffer and sustain irreparable injury and they will be irreparably harmed unless the defendants are enjoined by this Court; that any other relief to which plaintiffs could be remitted would be attended by such uncertainties and delays as to deny plaintiffs

the substantial relief to which they are entitled; that plaintiffs have not exhausted any administrative remedies provided by the laws of the State of Illinois for the reason that the remedy there provided is inadequate to provide the relief sought by the plaintiffs. The plaintiffs pray that this Court enter an order adjudging and declaring the "neighborhood school policy" or "attendance area policy" as employed by the defendants to be illegal and unconstitutional and in violation of plaintiffs' rights and for other and further relief.

The Board of Education and Robert F. Catlett filed their motions to dismiss the complaint and motions for preliminary injunction. Thereafter, plaintiffs asked and were granted permission to file their amended complaint, the pertinent portions of which are above set out. They do not ask for a preliminary injunction in their amended complaint.

The Board of Education's and Robert F. Catlett's motions to dismiss the amended complaint are before the Court.

The question at this point is limited; it is one of procedure and not of substance; it is one of mere practice and not of merit.

At this juncture the question for the Court to determine is not whether the plaintiffs have been denied the equal protection of the laws guaranteed to them by the Fourteenth Amendment but whether they have in the first instance proceeded in the proper manner for securing the remedies which have been provided (by the State of Illinois with an administrative review proceeding) in the

event that their constitutional rights have been denied to them.

In support of their motions to dismiss the amended complaint, the Board of Education and Robert F. Catlett assert, among other things, that the plaintiffs have failed to exhaust the procedures provided under the laws of the State of Illinois, which provide remedies to persons aggrieved for the reasons complained of in the complaint.

Where a state law provides adequate administrative procedure for the protection of rights, the federal courts manifestly should not interfere with the operation of the schools until such administrative procedure has been exhausted and the intervention of the federal courts is shown to be necessary. *Parham* v. *Dove*, 8 Cir. 1959, 271 F. 2d 132. *Covington* v. *Edwards*, 4 Cir. 1959, 264 F. 2d 780.

Section 22-19, Chapter 122, Illinois Revised Statutes, 1961, provides as follows:

> "Sec. 22-19. Upon the filing of a complaint with the Superintendent of Public Instruction, executed in duplicate and subscribed with the names and addresses of at least 50 residents of a school district or 10%, whichever is lesser, alleging that any pupil has been excluded from or segregated in any school on account of his color, race, nationality, religion or religious affiliation, or that any employee of or applicant for employment or assignment with any such school district has been questioned concerning his color, race, nationality, religion or religious affiliation or subjected to discrimination by reason thereof, by or on behalf of the school board of such district, the Superintendent of Public Instruction shall promptly mail a copy of such complaint to the secretary or clerk of such school board.

(Opinion of the United States District Court)

"The Superintendent of Public Instruction shall fix a date, not less than 20 nor more than 30 days from the date of the filing of such complaint, for a hearing upon the allegations therein. He may also fix a date for a hearing whenever he has reason to believe that such discrimination may exist in any school district. Reasonable notice of the time and place of such hearing shall be mailed to the secretary or clerk of the school board and to the first subscriber to such complaint.

"The Superintendent of Public Instruction may designate an assistant to conduct such hearing and receive testimony concerning the situation complained of. The complainants may be represented at such hearing by one of their number or by counsel. Each party shall have the privilege of cross examining witnesses. The Superintendent of Public Instruction or the hearing officer appointed by him shall have the power to subpoena witnesses, compel their attendance, and require the production of evidence relating to any relevant matter under this Act. Any Circuit or Superior Court of this State, or any judge thereof, either in term time or vacation, upon the application of the Superintendent of Public Instruction or the hearing officer appointed by him, may, in its or his discretion, compel the attendance of witnesses, the production of books, papers, records or memoranda and the giving of testimony before the Superintendent of Public Instruction or the hearing officer appointed by him conducting an investigation or holding a hearing authorized by this Act, by an attachment for contempt, or otherwise, in the same manner as production of evidence may be compelled before said court. The Superintendent of Public Instruction or the hearing officer appointed by him may cause the depositions of witnesses within the State to be taken in the manner prescribed by law for like depositions in civil actions in courts of this State, and to that end compel the

attendance of witnesses and the production of books, papers, records or memoranda. All testimony shall be taken under oath administered by the hearing officer, but the formal rules pertaining to evidence in judicial proceedings shall not apply. The Superintendent of Public Instruction shall provide a competent reporter to take notes of all testimony. Either party desiring a transcript of the hearing shall pay for the cost of such transcript. The hearing officer shall report a summary of the testimony to the Superintendent of Public Instruction who shall determine whether the allegations of the complaint are substantially correct. The Superintendent of Public Instruction shall notify both parties of his decision. If he so determines, he shall request the Attorney General to apply to the appropriate circuit court for such injunctive or other relief as may be necessary to rectify the practice complained of.

"The provisions of the 'Administrative Review Act,' approved May 8, 1945, and all amendments and modifications thereof and the rules adopted pursuant thereto shall apply to and govern all proceedings for the judicial review of any final decision rendered by the Superintendent of Public Instruction pursuant to this Section."

Plaintiffs assert that the remedy provided by the statute, hereinabove set out, does not provide an adequate procedure whereby plaintiffs may present their case for consideration before an administrative agency in that a judicial remedy is provided by the statute rather than an administrative remedy; that there is no individual right since it is required that there be 50 signatures on the complaint and further that notice is sent only to the first person on the petition; that there is no action in behalf of an individual but rather the action is in behalf of

the State of Illinois and thus there is no right of counsel or redress of wrong by an individual.

The plaintiffs' contention that an administrative remedy is not provided by the statute above is without merit. By the statute the Superintendent of Public Instruction or an assistant designated by him is charged with the responsibility of conducting a hearing to determine the validity of the complaint authorized to be filed under the statute. The complainants are specifically granted the right of representation by counsel and are further granted the privilege of cross examination.

The action instituted here is a class action, wherein the plaintiffs seek to have this Court enter a remedial order in favor of the entire class and in the words of the complaint the entire school area here involved is comprised of persons who it is alleged by the complaint are aggrieved and for whom relief is sought. Thus, it would appear that had the plaintiffs sought to obtain the signatures of a sufficient number of persons to proceed under the statute, there in all likelihood would have been little difficulty in obtaining the number of signatures required.

Plaintiffs, however, have not endeavored by any manner or means to attempt a proceeding under the statute but rather have elected to ignore the statute and thereby deprive the State of Illinois the opportunity to rectify its own wrong if it is found that one does exist.

It may well be that an attempt by plaintiffs to meet the requirements of the statute may be unsuccessful in that they may not be able to obtain a sufficient number of signatures on the complaint, or it may be impossible for plaintiffs to cause the Superintendent of Public Instruc-

tion to intercede on his own volition; yet, the Court is of the opinion that until the plaintiffs have attempted to avail themselves of the provisions that the administrative review provides, they have failed to comply in the remotest manner with the administrative remedy provisions, and until at least an honest attempt is made to pursue that remedy, this Court should not interfere with the state authorities and deprive them of the opportunity to put their own house in order. Since the plaintiffs have failed to pursue or even attempt to pursue the administrative remedy provided, this Court should not entertain this cause of action.

The mere assertion by plaintiffs that the administrative review provided for under the laws of the State of Illinois is inadequate, without first having attempted to utilize that remedy, does not show this Court that the administrative review is in fact ineffective to produce the result attempted by the statute and desired herein by these plaintiffs.

The motions to dismiss the amended complaint will be allowed.

/s/ William G. Juergens
United States District Judge

Dated: November 22, 1961

APPENDIX C.

Additional Statute Involved

Section 22-19, Chapter 122, Illinois Revised Statutes, 1961:

> Sec. 22-19. Upon the filing of a complaint with the Superintendent of Public Instruction, executed in duplicate and subscribed with the names and addresses of at least 50 residents of a school district or 10%, whichever is lesser, alleging that any pupil has been excluded from or segregated in any school on account of his color, race, nationality, religion or religious affiliation, or that any employee of or applicant for employment or assignment with any such school district has been questioned concerning his color, race, nationality, religion or religious affiliation or subjected to discrimination by reason thereof, by or on behalf of the school board of such district, the Superintendent of Public Instruction shall promptly mail a copy of such complaint to the secretary or clerk of such school board.
>
> The Superintendent of Public Instruction shall fix a date, not less than 20 nor more than 30 days from the date of the filing of such complaint, for a hearing upon the allegations therein. He may also fix a date for a hearing whenever he has reason to believe that such discrimination may exist in any school district. Reasonable notice of the time and place of such hearing shall be mailed to the secretary or clerk of the school board and to the first subscriber to such complaint.
>
> The Superintendent of Public Instruction may designate an assistant to conduct such hearing and receive testimony concerning the situation complained of.

(Additional Statute Involved)

The complainants may be represented at such hearing by one of their number or by counsel. Each party shall have the privilege of cross examining witnesses. The Superintendent of Public Instruction or the hearing officer appointed by him shall have the power to subpoena witnesses, compel their attendance, and require the production of evidence relating to any relevant matter under this Act. Any Circuit or Superior Court of this State, or any judge thereof, either in term time or vacation, upon the application of the Superintendent of Public Instruction or the hearing officer appointed by him, may, in its or his discretion, compel the attendance of witnesses, the production of books, papers, records or memoranda and the giving of testimony before the Superintendent of Public Instruction or the hearing officer appointed by him conducting an investigation or holding a hearing authorized by this Act, by an attachment for contempt, or otherwise, in the same manner as production of evidence may be compelled before said court. The Superintendent of Public Instruction or the hearing officer appointed by him may cause the depositions of witnesses within the State to be taken in the manner prescribed by law for like depositions in civil actions in courts of this State, and to that end compel the attendance of witnesses and the production of books, papers, records or memoranda. All testimony shall be taken under oath administered by the hearing officer, but the formal rules pertaining to evidence in judicial proceedings shall not apply. The Superintendent of Public Instruction shall provide a competent reporter to take notes of all testimony. Either party desiring a transcript of the hearing shall pay for the cost of such transcript. The hearing officer shall report a summary of the testimony to the Superintendent of Public Instruction who shall determine whether the allegations of the complaint are substantially correct. The Superintendent of Public

(Additional Statute Involved)

Instruction shall notify both parties of his decision. If he so determines, he shall request the Attorney General to apply to the appropriate circuit court for such injunctive or other relief as may be necessary to rectify the practice complained of.

The provisions of the "Administrative Review Act," approved May 8, 1945, and all amendments and modifications thereof and the rules adopted pursuant thereto shall apply to and govern all proceedings for the judicial review of any final decision rendered by the Superintendent of Public Instruction pursuant to this Section.